Security

OGC 78-0669
2 February 1978
OIC-78-0454

490

MEMORANDUM FOR: [redacted] STAT

FROM : [redacted]

SUBJECT : Justification for Statutory Authority to Protect Sources and Methods

Attached is a self-explanatory draft of a letter which I propose to send to the staff of the House Permanent Select Committee on Intelligence, with a copy to the staff of the Senate Select Committee on Intelligence, for consideration in the development of intelligence charter legislation. I have not attached copies of the attachments because the relevant provisions are cited in the letter. However, you may have copies if you feel that will be necessary for a fair assessment of the letter itself. Please let me have your comments, and those of anyone else in your areas you believe should see this, before 10 February 1978.

[redacted] STAT

Attachment

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

Mr. William F. Funk
Professional Staff Member of the
Subcommittee on Legislation
House Permanent Select Committee
on Intelligence
Capitol
Washington, D.C. 20515

Dear Bill:

In the context of our 11 January 1978 discussion of the authorities and responsibilities provided to the Director of National Intelligence by the proposed Title I of the intelligence "charter legislation" package prepared by the staff of the Senate Select Committee on Intelligence, you requested our views concerning the necessity for continued independent statutory authority to protect "unclassified" intelligence sources and methods from disclosure.

Endless debate could be generated regarding whether or not various examples we might produce could or should be classified, for instance, documents produced for and provided to a defector to establish a new identity in the U.S. The more precise question is, however, whether there exists an identifiable body of information, documentary or otherwise, relating to intelligence sources and methods which is of such central importance to the effective conduct of the national foreign intelligence programs of the United States and the operations of this Agency as to warrant statutory protection independent of the vagaries of the classification system established and subject to change by Executive Order. Not whether such information may or should be classified according to the hierarchical standards of that system, but whether it should be protected as a category of information requiring protection in its own right.

It is obvious that this Agency cannot perform its major general functions of collecting, analyzing, correlating, producing, and disseminating national foreign intelligence without sources of intelligence information and other methods of obtaining, verifying, and supplementing such information. It is

inherent in the nature of these sources and methods that their disclosure substantially and adversely affects their availability, productivity, and potential. In the case of human sources, or methods requiring human participation to one extent or another, even the absence of sufficient assurances of nondisclosure may serve to lessen the degree of cooperation which would otherwise be available, and, in some cases, may even eliminate the willingness to cooperate at all.

To the extent that reasonable men may differ concerning whether the exposure of a single relationship or operation, or the identification of a single employee, source or contact, will in and of itself result in damage of any degree to the imposing and amorphous concept which is "the national security" of the United States, there can be no long-term assurances based upon the classification system. Frequently, concluding such damage will occur requires a willingness to make a "leap of faith" to the effect that the exposure of a source, technique or relationship not only affects the source or method involved, but also deters others from entering such relationships or allows countermeasures which may reduce the effectiveness of alternative methods. On the other hand, it is generally a simple matter to determine that someone or something is an intelligence source or method. Thus, the authority to protect such information independent of the judgments required under classification standards is a much more stable and dependable mechanism for the prevention of its unauthorized disclosure.

This protection should extend, as it does now, to the identities of CIA agents, contacts, sources, the organization, functions, names, official titles, salaries and numbers of CIA personnel, and information concerning technical means and devices for collecting, analyzing and producing intelligence. The courts have had little difficulty applying this authority, and the existence and justification for the authority to protect sources and methods information have been accepted by the judiciary historically, see, e.g., Totten v. United States, 92 U.S. 105(1875); United States v. Reynolds, 345 U.S. 1(1952), and in numerous recent instances in the context of the Freedom of Information Act. In every instance the courts have approved the invocation of the Agency's statutory authority to withhold from disclosure information which might otherwise have to be disclosed in the absence of a statutory provision. The value of the authority in this context is demonstrated by the following illustrative citations.

In Richardson v. CIA, Civ. No. 75-298 (W.D. Pa. January 30, 1976) (copy attached), the court considered whether CIA financial information related to sources and methods, and concluded,

> Congress, in recognition of the close correlation between the funding and actual operation of an intelligence network, has amply guarded against the unauthorized disclosure of intelligence sources and methods by exempting from public scrutiny receipts and expenditures relative to the CIA .... As is so clearly demonstrated by the defendants' affidavits, disclosure of the information and records pertaining to the expenditures and transfers of public monies relative to the CIA would compromise and open up for inspection the government's intelligence network and capabilities thereby making it impossible for anyone to protect intelligence sources and methods from unauthorized disclosure.

In Bachrack v. CIA, No. CV 75-3727-WPG, (C.D. Cal. May 13, 1976) (copy attached), the court agreed with CIA's refusal to confirm or deny any relationship between the Agency and a deceased individual and said,

> Where, as here, a request is made for information relating to a covert relationship, the CIA can respond only by refusing to confirm or deny that such relationship exists. Any other response would have the effect of divulging the very secret the CIA is directed to protect .... While there is a strong public interest in the public disclosure of the functioning of governmental agencies, there is also a strong public interest in the effective functioning of an intelligence service, which could be greatly impaired by irresponsible disclosure.

The court in Hayden v. CIA, Civ. No. 76-284 (D.C.D.C. April 15, 1977) (copy attached), after examining numerous documents in camera concluded that the sources and methods authority had been properly invoked and could be relied upon to protect names of CIA employees, identities of CIA sources, CIA organizational data, specific office assignments of CIA employees, and the location of CIA stations. Baker v. CIA, 425 F. Supp. 633, 636 (D.C.D.C. 1977), involved whether CIA regulations concerning internal personnel matters could be withheld from disclosure. The court concluded:

> ... Collectively the documents reflect management attitudes, techniques, safeguards, and conditions of employment.... [T]he CIA may determine that disclosure of personnel matter may by itself constitute the danger to security or intelligence sources and methods that the statute expressly seeks to prevent. No preliminary showing should be required of the CIA to prove that disclosure would in fact damage intelligence activities or compromise intelligence sources and methods. This determination already has been made by Congress, subject to implementation by the agency.

Finally, in Wood v. CIA, Civ. No. 75-366 T-K (M.D. Fla. January 6, 1977) (copy attached), the court concluded that the Agency had not established the proper classification of materials related to covert operations resulting in the

foreign publication and dissemination of certain books and thus could not deny the materials requested by the plaintiff on that ground. Nonetheless, the court went on to deny the request and dismiss the action on the ground that to do so would expose employment relationships and functions of CIA agents. These are cases where sensitive sources and methods information would be required to be disclosed but for the existence of protective authority independent of the classification system. See also, Weismann v. CIA, Civ. No. 76-1566 (D.C. Cir 1977); Phillippi v. CIA, 546 F. 2d 1009 (D.C. Cir 1976).

Furthermore, it would appear to be incongruous to refuse to provide protection for intelligence sources and methods, classified or not, when federal law now protects the following categories of official information for various policy reasons -- departmental reports to Congress (5 U.S.C. 1163, 10 U.S.C. 1582), insecticide formulae (7 U.S.C. 135a(c)(4), f(b), f(d)), cotton statistics (7 U.S.C. 472), tobacco statistics (7 U.S.C. 507), marketing agreements (7 U.S.C. 608d(2)), peanut statistics (7 U.S.C. 955), sugar production surveys (7 U.S.C. 1159), crop reports (7 U.S.C. 1373(c)), visa data (8 U.S.C. 1202(f)), census information (13 U.S.C. 9, 214), SEC information (15 U.S.C. 78x, 79v, 80-32(b), 80a-44, 80b-10), Commerce reports (15 U.S.C. 176a, 190), FPC information (15 U.S.C. 717g, 825), unemployment compensation (18 U.S.C. 605), diplomatic codes and correspondence (18 U.S.C. 952), crop information (18 U.S.C. 1901-03), Reconstruction Finance Corp. (18 U.S.C. 1904), proprietary information (18 U.S.C. 1905, 26 U.S.C. 7213(b)), bank loans (18 U.S.C. 1906), land bank debtors (18 U.S.C. 1907), agricultural credits (18 U.S.C. 1908), civil service examinations (18 U.S.C. 1917(4)), trade secrets (21 U.S.C. 331(j)), IMF data (22 U.S.C. 286f(c)), foreign service officers (22 U.S.C. 987), exchange programs (22 U.S.C. 1436), income tax (26 U.S.C. 7213(a)(1), 7217), drug reports (26 U.S.C. 7237(e)), sugar tax (26 U.S.C. 7240), collective bargaining (29 U.S.C. 181(a)), patents (35 U.S.C. 122, 181, 186), veteran's claims (38 U.S.C. 3301), postal savings (39 U.S.C. 762), addict treatment (42 U.S.C. 260(d)), social security, excise and other tax information (42 U.S.C. 1306), confidential official information (44 U.S.C. 3508), Railroad Retirement Bd. claims (45 U.S.C. 362(d), (m)), Coast Guard inspection and discharge information (46 U.S.C. 234, 643(f)), common carrier data (46 U.S.C.819, 49 U.S.C. 15(11), 320, 322, 913, 917, 1021), FCC information (47 U.S.C. 154, 220), communications transmitted (47 U.S.C. 605), handicapped voting (48 U.S.C. 55), shipping (49 U.S.C. 15(13)), Bureau of Mines (50 U.S.C. 139), Selective Service (50 U.S.C. App. 327), vessel procurement contracts (50 U.S.C. App. 1152(4), (5)), housing construction insurance (50 U.S.C. App. 1896), Defense Production Act reports (50 U.S.C. App. 2155), commodities (50 U.S.C. App. 2160(f)), and exports (50 U.S.C. App. 2406(c), 22 U.S.C. 414(b)). It could be argued the espionage statutes (18 U.S.C. 793-798) exist as the counterparts to these provisions in regard to intelligence sources and methods. However, many of these statutes

create an affirmative authority to protect information in addition to establishing a penalty for its disclosure. Furthermore, as you are aware, the espionage laws are far from adequate, provide only an after-the-fact remedy, and require in their own right a showing of damage to the national defense which more often than not must be premised upon proper classification of the information in question. A further important distinction is the fact that the provisions of law cited above protect information which generally is required by law to be provided to the U.S. Government. Thus, the absence of specific independent authority in the agency head to protect the information, and even instances of unauthorized disclosure, whether criminally punishable or not, do not risk interfering with the availability of the information itself as is often the case with intelligence sources and methods. Finally, it should be kept in mind, when considering the effects of weakening or omitting the existing authority in any new legislation, that the courts are certain to interpret any retreat from existing authority as a congressional signal that intelligence sources and methods no longer merit the careful treatment accorded them in the past. Neither this Agency nor the Director is interested in an offensive authority to protect sources and methods. Our concern is solely defensive in nature, i.e., the authority to withhold certain types of information from disclosure regardless of the provisions of other laws, and without reliance upon the judgments of individuals or organizations whose interests and motives may differ or fluctuate over time. For these reasons, we would suggest that Section 108(1) of Title I, relating to one of the authorities of the proposed Director of National Intelligence, be revised as follows:

> (l) The Director shall be responsible without regard for any other provision of law, for protecting from disclosure information relating to intelligence sources, methods and analytical procedures. This authority shall be limited to the protection from publication or disclosure of information or material which would tend to reveal, among other things, the identity of intelligence agents, sources or contacts, the means or devices by which intelligence is collected, analyzed, correlated, produced or disseminated, and the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Central Intelligence Agency. In furtherance of this authority, the Director shall establish common security standards for access to, management, and handling of information and material relating to intelligence sources and methods.
>
> (m) The Director shall establish standards designed to protect against overclassification and to provide for timely declassification of intelligence information and material, as appropriate, and consistent with applicable law and executive order.

(Subparagraphs (m) through (p) would be relettered (n) through (q).)

This modification would grant the Director authority necessary to protect sources and methods, and yet would not allow unfettered discretion to act in the name of sources and methods. While there is always the possibility that this limited authority could be used to withhold information for other reasons, the harm which could result from the loss of the authority outweighs the small risk of such an abuse. Further, this formulation would meet the requirements of 5 U.S.C. 552(b)(3) that such an authority not be discretionary or that it establish a particular criteria for withholding or refer to particular types of matters to be withheld. If Title IV continues to provide for a separate Director of the Agency, or to list separate authorities for the Agency, it would be desirable to repeat these provisions there to avoid the problems which will be associated with attempting to gain the attention of a Director of National Intelligence who is burdened with concerns other than the day-to-day management of CIA.

I trust this letter will be useful to you and contains more information than you ever cared to know in this regard. Should you have further questions or comments please do not hesitate to call on me.

Yours truly,

STAT

cc: Bill Miller/SSCI